TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT	2
REASONS FOR NOT GRANTING WRIT	3
I. The Decision Below is Clearly Correct	3
II. There is no Conflict of Decisions	6
III. There is no Important Question of Federal Law	8
CONCLUSION	11

Cases Cited

King v. Smith, 392 U. S. 309, 88 S. Ct. 2128 (1968)..3, 7-10

Tartaglio v. Department of Institutions & Agencies, 102 N. J. Super. 592 (App. Div., 1968)..... 6, 13

Statutes Cited

42 U.S.C.A.:

601 5

602(a)(7) 5

604 5

606(a) 5

N.J.S.A. 44:7-18 2

N.J.S.A. 44:10-1 5

N.J.S.A. 44:10-2(c)(2) 5

PAGE

N.J.S.A. 44:10-3 4

Social Security Act 9

Regulations Cited

Handbook Public Assistance Administration Sec. 3120(4) 33 F.R. 11290 (Sec. 203.1) 10

Categorical Assistance Budget Manual Sec. 706.2 (c)(2)(6) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1155

ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),

Petitioners,

vs.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

May the State of New Jersey, in determining whether a child is needy, take into account the actual and regular contributions to his support made by his stepfather with whom he lives as part of a family unit?

Statement

Petitioners are a family unit consisting of five minor children, their mother, and the mother's second husband, the stepfather of the children, who maintain a home together.

In 1963 Carolyn Basmajian and her five minor children were deserted by her husband and the father of the children, James Basmajian, and thereafter the family was granted Assistance for Dependent Children from the Atlantic County Welfare Board, effective January 1963. Carolyn Basmajian later secured a divorce from James Basmajian and on January 10, 1966 she married her present husband, Anthony Tartaglio, one of the instant petitioners.

After this change in the family's composition, the Atlantic County Welfare Board rebudgeted the family in order to consider any changes in income and needs. After considering the income of the members of the family, including the stepfather, who, incidentally, informed the county welfare board that he would assume as much of the responsibility for supporting his stepchildren as he could, the welfare board reduced the monthly grant from $251.00 to $126.00 because of the increased support to the children following the remarriage.

In 1967 the board rebudgeted the family again and found that based on an increase in income the members were ineligible for continued assistance, and discharged the case effective June 1, 1967.

The mother appealed to the New Jersey Department of Institutions and Agencies for an administrative Fair Hearing, pursuant to N.J.S.A. 44:7-18 from the determination of the Atlantic County Welfare Board. On October 26, 1967 the Department held a Fair Hearing, and on

November 3, 1967, issued its decision which affirmed the action of the county welfare board. The Fair Hearing decision stated that the county welfare board correctly applied the relevant budgetary regulations in the case. It also observed that petitioners could reapply for assistance and have a rebudgeting whenever any significant change in income or needs should occur in the family.

The petitioners then appealed to the Appellate Division of the Superior Court of the State of New Jersey. Attorneys for both sides fully briefed the case and argued it before said court which rendered its decision on September 19, 1968. The court affirmed the ruling of the New Jersey Department of Institutions and Agencies and held that the United States Supreme Court case of *King* v. *Smith,* 392 U. S. 309 (1968), was both "factually and legally distinguishable" from the case *sub judice.*

On October 31, 1968 petitioners filed a notice of appeal to the Supreme Court of New Jersey. On January 14, 1969, the New Jersey Supreme Court granted respondent's motion to dismiss petitioner's appeal for lack of a substantial constitutional issue, and also denied certification to petitioners.

This petition for a Writ of Certiorari followed.

Reasons for Not Granting the Writ

This case does not warrant review by this court on *Certiorari* for any one of the traditional reasons.

I

The decision below is clearly correct.

This case was decided by both the State administrative agency and the State court upon a record of certain facts, which the New Jersey Court found as follows:

> "The record before us reveals that plaintiffs are living together as a family unit; their stepfather considered the stepchildren dependents for purposes of withholding tax exemptions; he assumed the role of a spouse and father to his wife's offspring; and he was willing to assume 'as much of the responsibility as he could'."

The Court also found that the State administrative agency's decision was correctly based on the applicable New Jersey and federal statutes and regulations.

In the agency's decision there was a specific referral to its rules and regulations which are identified as the "Categorical Assistance Budget Manual", and the Court found as follows:

> Section 706.2, subsection c 2(a) thereof, provides as follows:
>
> "When an ADC family consists of a natural or adoptive parent, eligible child(ren) and a stepparent (the family may or may not also include ineligible child(ren)) * * * need shall be determined on the basis of the family budget unit. Need exists if the income of ALL members of the family is less than the sum of basic and special circumstance requirements for all family members * * * Need does NOT exist if the income of the family equals or exceeds the sum of the basic and special circumstance requirements for all family members."

The department adopted these rules and regulations pursuant to N.J.S.A. 44:10-3 which authorizes their adoption, generally, "to secure for the State of New Jersey the maximum Federal financial participation that is available with respect to a program of assistance for dependent children" and, specifically, to provide that in determining

need for financial assistance, there shall be taken into consideration all income and resources "of the dependent child and of the parent, parents, or other relatives with whom such child is living". N.J.S.A. 44:10-1, subsection (c) (2), in defining "dependent child", includes a child living with a "stepfather" and subsection (d)(1) provides that "parent or relative with whom a dependent child is living" means a person related to the dependent child in the manner described in subsection (c)(2).

The New Jersey enactment (N.J.S.A. 44:10-1, *et seq.*), implements federal legislation dealing with "Grants to States for Aid and Services to Needy Families with Children". 42 U.S.C.A. Sec. 601, *et seq.* Section 602(a)(7) of the federal law requires that a state agency, in determining need, shall take into consideration the income and resources "of any child or relative claiming aid to families with dependent children, * * *" and section 606(a) states that the term "dependent child" means a needy child,

> "(1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, STEPFATHER, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece * * * (Emphasis supplied.) (This section is incorporated by reference in section 606(c) which defines the term 'relative with whom any dependent child is living')."

Moreover, under Section 604 of the federal law, payments may be discontinued if the state fails to comply substantially with any provision required by Section 602(a).

The state court reviewed these state and federal legislative enactments and concluded:

> "It is thus clear that the applicable administrative rules and regulations, the authority for which is not challenged, reflect an adherence to the express policy of the federal and state legislation to include, in a family budget formula, the income of a stepfather who assumes a spousal relationship. The wisdom of such legislation, even if it should be considered debatable, is not to be questioned by the judiciary." *Tartaglio* v. *Dep't of Institutions & Agencies,* 102 N. J. Super. 592 (App. Div. 1968), at 596.

It is respectfully submitted that this conclusion is sound and that the court below correctly analyzed both the facts and the law involved in this case.

II

There is no conflict of decisions.

There are no decisions contrary to the decision in the instant case. The stepfather petitioner alleges that he "is in the same position as the petitioners in *King* v. *Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968). He is under no legal obligation to support the infant petitioners. He is not contributing to their support. Nor, in fact, can he afford to contribute" (P7).

As indicated previously, the decision in the case was based on an entirely different set of facts from what the above allegations would infer. It was found below that the petitioners, the mother, her children and the stepfather, all lived together as a true family unit; that the stepfather assumed the role of the spouse to his wife and a father to his wife's offspring; that he claimed the stepchildren as dependents for purposes of federal income tax withholding exemptions; and that he even confided to the welfare personnel that he was willing to assume as much

of the responsibility for the support of the children as he could.

Despite this, the petitioners are now seeking *Certiorari* from this Court based on an implication that the facts were contrary to these facts as found by the State administrative agency and court and on the allegation that the facts in the case are "like" those in the *King* case (*supra*). We urge, therefore, that petitioners are now trying to submit this case to the United States Supreme Court upon an alleged or hypothetical state of facts that are entirely at variance from the facts which were considered by the State administrative agency and the State court. This, of course, they may not do, and this court should not *Certiorari* to consider a question not raised by the true facts of the case.

The factual differences between our case and the *King* case, *supra,* are dramatic and obvious. In the *King* case, the so-called "substitute father" of the children, was a man who had 9 children of his own and lived with his own wife and family all of whom were dependent upon him for support. He was not the father of any of the children of the mother; he was not obligated under Alabama law to support any of those children; he was not willing or able to support the children; and, in fact, he *did not* support them. (Emphasis added.) In our case, Mr. Tartaglio is married to the mother of the children; he, the mother and all of the children live together as a family unit; he considered these children as his dependents for the purposes of withholding tax exemptions on his United States Federal Income Tax returns; he assumed the role of a spouse to the mother and a father to all of the children; he was willing to assume as much of the responsibility for their support as he could.

An example of petitioners' erroneous reasoning is detectable in the allegation that following the marriage of

the mother to her second husband, and "as a result of the marriage" the Aid to Dependent Children grant was reduced. On the contrary, the grant was not reduced "as a result of the marriage", but only following a rebudgeting of the family by the county welfare board of the income and resources of the family as contrasted with the family's financial needs.

Again, they allege that they argued below that the welfare board's action was a violation of due process in that the stepfather petitioner "was now forced to support his stepchildren even though he was under no legal obligation to do so". This argument was dispatched by the State Court as follows:

> "Neither the board nor the Department purported to impose a legal obligation on the stepfather to support his stepchildren and, indeed, it was not within their power to do so."

In the *King* case, this Court held that there was "no question that States have considerable latitude in allocating their Aid For Dependent Children resoures, since each State is free to set its own standard of needs".

In fact, in that case this Court held that even contributions from "the kind of person Alabama calls a substitute father can be taken into account in determining whether the child is needy", and, "if by reason of such a man's contribution the child is not in financial need, the child would be ineligible for Aid For Dependent Children assistance without regard to the substitute father role".

III

There is no important question of federal law.

Petitioner's allege that the United States Supreme Court has never decided "whether the 'other income and re-

sources' referred to in both the Social Security Act and Title 44 of the New Jersey Statutes includes 'assumed' income or only actual contributions". This question is not involved in the present case because the facts, as found by the State Agency and the State Court, were that this stepfather was making actual contributions to the stepchildren. Accordingly, that issue was not involved in this case and the Court should not hear such a hypothetical issue.

Furthermore, even if such a hypothetical issue were involved in this case this Court's decision in the *King* case (*supra*) would be fully dispositive of same.

There is no question in this case concerning whether this stepfather, by administrative action, is being legally obligated to provide support to his stepchildren. It is the law of New Jersey that such a stepparent is not liable for his stepchildren. This was recognized by the State administrative agency and reiterated by the State Court below. Additionally, that is an entirely different question from the question whether actual and regular contributions from a stepfather in a situation like ours, even though voluntary, may be considered when determining whether children are eligible for Aid For Dependent Children under the State's assistance plan.

In their petition for certiorari, petitioners state that they "do not seek to ban the state from inquiring into the amount of money which the stepfather may make available to the children" nor "seek to prohibit the county welfare board from reducing their Aid For Dependent Children grant on the basis of contributions actually made". They allege "they seek only a declaration that the State agency may not arbitrarily assume that the stepfather's income is available regardless of facts to the contrary". In reply to this, respondents urge that such a declaration

by this Court is not necessary. This is already the law and the State is willing to stipulate same. The State of New Jersey in all cases, including this case, does not "arbitrarily assume that the stepfather's income is available regardless of facts to the contrary". Again, we come to the heart of the weakness of petitioners' position in this case, *i.e.*, they are attempting to submit this case to this Court on an entirely different statement of facts than existed in the case below as determined by the State administrative agency and the State Court.

Petitioners lay much stress on the fact that in August of 1968 the United States Department of Health, Education and Welfare promulgated Section 203.1 of Chap. 11, Title 45, which provides that State plans for aid to families with needy children must provide that in determining whether a child is needy only such net income as is actually available for current use on a regular basis for the child will be considered.

However, this requirement that only such net income as is actually available for current use on a regular basis should be considered in determining a child's needs, was in effect before this case was decided below. Even in 1967, prior to this Court's decision in the *King* case, the *Handbook of Public Assistance Administration,* section 3120, part 4, provided that in determining need, a state must take into account only available and regular contributions, and must not assume income. Moreover, this was expressly brought to the attention of the State Court.

It is a fair comment to say that the present petition seeks to convert a correct decision in a simple case into a Supreme Court case, which would merely reiterate the findings in the *King* case (*supra*) anyway.

Even if we assume *pro arguendo* that petitioners' financial circumstances have changed since the decision below,

they have only to go back to the welfare board and show same, and if they are eligible for assistance they will receive it. As the State Court observed of the State agency's opinion, it was indicated to petitioners from the onset that "it will be appropriate for her (petitioner) to make reapplication for assistance and have a rebudgeting of her case whenever any significant reductions in income or increases in requirements should occur in this family situation".

In view of this, and all of the above factors in this case, this Court should deny *Certiorari.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR J. SILLS, ESQ.,
Attorney General of New Jersey,
Attorney for Respondent.
By: EUGENE T. URBANIAK,
Deputy Attorney General,
Of Counsel.

Date: April 15, 1969.